

E-Filed on 3/26/09

1 3993 Howard Hughes Parkway, Suite 600  
 2 Las Vegas, NV 89169-5996  
 3 Facsimile (702) 949-8321  
 4 Telephone (702) 949-8320

5 Rob Charles NV State Bar No. 006593  
 6 Email: rcharles@lrlaw.com  
 7 John Hinderaker AZ State Bar No. 018024  
 8 Email: jhinderaker@lrlaw.com  
 9 Attorneys for USACM Liquidating Trust

10 **UNITED STATES BANKRUPTCY COURT**  
 11 **DISTRICT OF NEVADA**

12 In re:

13 **USA COMMERCIAL MORTGAGE**  
 14 **COMPANY,**

15 **USA CAPITAL REALTY ADVISORS,**  
 16 **LLC,<sup>1</sup>**

17 **USA CAPITAL DIVERSIFIED TRUST**  
 18 **DEED FUND, LLC,**

19 **USA CAPITAL FIRST TRUST DEED**  
 20 **FUND, LLC,<sup>2</sup>**

21 **USA SECURITIES, LLC,<sup>3</sup>**

Debtors.

22 **Affects:**

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

22 Case No. BK-S-06-10725-LBR<sup>1</sup>  
 23 Case No. BK-S-06-10726-LBR<sup>1</sup>  
 24 Case No. BK-S-06-10727-LBR<sup>2</sup>  
 25 Case No. BK-S-06-10728-LBR<sup>2</sup>  
 26 Case No. BK-S-06-10729-LBR<sup>3</sup>

27 **CHAPTER 11**

28 Jointly Administered Under Case No.  
 29 BK-S-06-10725 LBR

30 **SECOND OMNIBUS OBJECTION**  
 31 **OF USACM TRUST TO PROOFS OF**  
 32 **CLAIM BASED, IN WHOLE OR IN**  
 33 **PART, UPON INVESTMENT IN**  
 34 **COPPER SAGE COMMERCE**  
 35 **CENTER, LLC LOAN EXCEPT FOR**  
 36 **AMOUNTS DESIGNATED AS**  
 37 **“UNREMITTED PRINCIPAL”; AND**  
 38 **CERTIFICATE OF SERVICE**

39 Date of Hearing: April 30, 2009

40 Time of Hearing: 9:30 a.m.

41 The USACM Liquidating Trust (the “USACM Trust”) moves this Court, pursuant  
 42 to § 502 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) and  
 43 Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for an

44  
 45 <sup>1</sup> This bankruptcy case was closed on September 23, 2008.

46 <sup>2</sup> This bankruptcy case was closed on October 12, 2007.

47 <sup>3</sup> This bankruptcy case was closed on December 26, 2007.

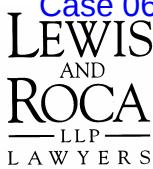


1 order disallowing the Proofs of Claim filed by individual investors (“Direct Lenders”)  
2 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are  
3 based upon an investment in the Copper Sage Commerce Center, LLC Loan (the “Copper  
4 Sage I Loan”) that has been repaid to the Direct Lenders. This Objection is supported by  
5 the Court’s record and the Declaration of Edward M. Burr in Support of Omnibus  
6 Objections to Proofs of Claim Based Upon the Investment in Copper Sage Commerce  
7 Center, LLC Loan filed with the Court today (the “Burr Decl.”).

8 **I. INTRODUCTION**

9 1. On about June 22, 2006, the borrower paid off the Copper Sage I Loan in  
10 full. In turn, USACM distributed the proceeds from the Copper Sage I Loan to the Direct  
11 Lenders who invested in the Copper Sage I Loan. However, Mesirow Financial Interim  
12 Management, LLC (“Mesirow”) determined that some of the proceeds from the Copper  
13 Sage I Loan were diverted by USACM and thus never paid to the Direct Lenders  
14 (“Unremitted Principal”). Minus Unremitted Principal, the Direct Lenders were paid in  
15 full on the Copper Sage I Loan, subject to servicing fees and any other charges under their  
16 respective Loan Servicing Agreements and this Court’s orders, including the Confirmation  
17 Order.

18 2. To the extent the Direct Lenders were paid, there is no longer any basis for a  
19 Direct Lender claim against USACM based upon an investment in the Copper Sage I Loan  
20 and the USACM Trust objects to those amounts. As for Unremitted Principal, the  
21 USACM Trust asks that the Court allow those amounts as general unsecured claims. A  
22 break down of each Direct Lender’s claim on the Copper Sage I Loan, including the  
23 amount of Unremitted Principal to be allowed as a general unsecured claim, is listed in  
24 **Exhibit A**, attached.



1       **II. JURISDICTION**

2       1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334  
3 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core  
4 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

5       2. The statutory predicate for the relief requested herein are 11 U.S.C. § 502 and  
6 Bankruptcy Rule 3007.

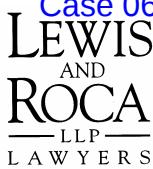
7       **III. BACKGROUND**

8       1. On April 13, 2006 (“Petition Date”), USACM, USA Securities, LLC (“USA  
9 Securities”), USA Capital Realty Advisors, LLC (“USA Realty”), USA Capital Diversified  
10 Trust Deed Fund, LLC (“DTDF”), USA Capital First Trust Deed Fund, LLC (“FTDF,”  
11 together with DTDF, the “Funds”) (collectively, the “Debtors”), filed voluntary petitions  
12 for relief under chapter 11 of the Bankruptcy Code. Debtors continued to operate their  
13 businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of the  
14 Bankruptcy Code. Debtors’ post-petition management of the Debtors was under the  
15 direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC  
16 (“Mesirow”), who served as the Chief Restructuring Officer.

17       2. USACM is a Nevada corporation that, prior to the Petition Date, was in the  
18 business of underwriting, originating, brokering, funding and servicing commercial loans  
19 primarily secured by real estate, both on behalf of investors and for its own account.

20       3. That business included the solicitation of individual investors to purchase  
21 fractional interest in loans that USACM originated and then serviced. These investors,  
22 totaling approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in  
23 USACM’s bankruptcy case and in this Objection.

24       4. Although USACM serviced and sometimes originated the loans in which the  
25 Direct Lenders invested, generally USACM was not a borrower on these loans.



1       5. On September 14, 2006, the Court entered its Order Setting Deadline to File  
2 Proofs of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The Bar  
3 Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the  
4 deadline (“Bar Date”) for creditors to file proof of claims.

5       6. On September 25, 2006, Debtors served a copy of the Bar Date Order on  
6 their service lists [Docket No. 1358]. All Creditors, including the Direct Lenders, were  
7 served with a copy of the Bar Date order as well [Docket No. 1358].

8       7. On November 6, 2006, a stipulation was filed and an order entered extending  
9 the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket  
10 No. 1729].

11      8. On January 8, 2007, this Court entered its Order Confirming the “Debtors’  
12 Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No.  
13 2376] (the “Confirmation Order”).

14      9. Under the Plan, the USACM Trust is the successor to USACM with respect  
15 to standing to seek allowance and disallowance of Claims.

16      10. Under the Plan, unsecured claims of Direct Lenders against USACM are  
17 classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in  
18 the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share of  
19 the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims,  
20 Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and  
21 expenses of implementation of the USACM Plan for USACM and the USACM Trust.”

22      11. The USACM Trust exists as of the Effective Date of the Plan, which was  
23 March 12, 2007. Geoffrey L. Berman is the Trustee.

24      12. **Exhibit A** to this Objection lists Proofs of Claim filed by Direct Lenders that  
25 appear to be based, in part, upon an investment in the Copper Sage I Loan. (Burr Decl. ¶  
26



1       7.) **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address,  
2       the total amount of the claim, the total amount of the claim that appears to be related to an  
3       investment in the Copper Sage I Loan based upon the information provided by the  
4       claimant, and the total amount of Unremitted Principal scheduled by Mesirow. (Burr  
5       Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the Copper Sage I  
6       Claims.

7       13.      The column listing "Unremitted Principal" on **Exhibit A** represents amounts  
8       determined by Mesirow to be General Unsecured Claims held against the USACM Estate  
9       as a result of USACM collecting principal from a Borrower under a loan, but not remitting  
10      such principal to the Direct Lender. (Burr Decl. ¶ 8.) Amounts designated as Unremitted  
11      Principal are documented in the Third Amendment to Bankruptcy Schedule F-1 of the  
12      Schedules and Statements filed on March 20, 2007. (Burr Decl. ¶ 8.)

13       14.      On or about June 22, 2006, the Copper Sage I Loan was paid off in full, as  
14       reflected in USACM's books and records. (Burr Decl. ¶ 9.) Shortly thereafter, USACM  
15       processed the payoff and distributed the proceeds to the Direct Lenders on the Copper Sage  
16       I Loan. (Burr Decl. ¶ 9.)

17       15.      Minus Unremitted Principal, the Direct Lenders were in turn paid in full,  
18       subject to servicing fees and any other charges under their respective Loan Servicing  
19       Agreements and this Court's orders, including the Confirmation Order. In general, the  
20       Direct Lenders received their principal and interest on the Copper Sage I Loan, less  
21       Unremitted Principal and sums withheld for servicing fees, servicer advances, Prepaid  
22       Interest and sums known as the 2% Holdback pursuant to the Confirmed Plan. On the  
23       Effective Date of the Plan, the Prepaid Interest was applied, a portion of the 2% Holdback  
24       was applied to the allowed claims of the Direct Lender Committee, and the balance paid to  
25       the Direct Lenders. (Burr Decl. ¶ 10.)

26



1       16. Accordingly, the USACM Trust no longer has further obligations to the  
 2 Direct Lenders arising out of the Copper Sage I Loan to the extent that loan has been  
 3 repaid to the Direct Lenders, pursuant to USACM's books and records. (Burr Decl. ¶ 11.)

4 **IV. APPLICABLE AUTHORITY**

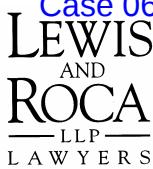
5       1. Under the Bankruptcy Code, any Claim for which a proof of claim has been  
 6 filed will be allowed unless a party in interest objects. If a party in interest objects to the  
 7 proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim  
 8 and shall allow the Claim except to the extent that the Claim is "unenforceable against the  
 9 debtor . . . under any . . . applicable law for a reason other than because such claim is  
 10 contingent or unmatured." 11 U.S.C. § 502(b).

11       2. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C.  
 12 § 502(a). This objection is timely under the confirmed Plan, as the deadline for such  
 13 objections has been extended to February 12, 2008, by this Court's orders.

14       3. A properly filed proof of claim is presumed valid under Bankruptcy Rule  
 15 3001(f). However, once an objection to the proof of claim controverts the presumption, the  
 16 creditor ultimately bears the burden of persuasion as to the validity and amount of the  
 17 claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,  
 18 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate  
 19 burden of proof as to the validity of a proof of claim "remains at all times upon the  
 20 claimant." *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039  
 21 (9th Cir. 2000).

22 **V. OBJECTION TO CLAIMS LISTED IN EXHIBIT A**

23       1. **Exhibit A** attached and incorporated by this reference lists the Copper Sage I  
 24 Claims. The USACM Trust objects to these claims to the extent they are based upon an  
 25 investment in the Copper Sage I Loan that USACM repaid to the Direct Lenders.



1 According to USACM's books and records as reconstructed by Mesirow, the Copper Sage  
2 I Loan has been repaid in full, and the Direct Lenders have received such payment, except  
3 for Unremitted Principal, as provided by the applicable Loan Servicing Agreement, this  
4 Court's orders and the Confirmation Order.

5 2. As for the amounts designated as Unremitted Principal on **Exhibit A**, the  
6 USACM Trust moves the Court to allow those amounts as general unsecured claims.

7 3. Certain of the Copper Sage I Claims may be the subject of subsequent, and  
8 perhaps multiple, objections if they are being asserted on the basis of multiple investments  
9 through USACM. Such Claims may also be subject to prior or subsequently filed  
10 objections, and this objection is without prejudice to any other objection by any party in  
11 interest, including the USACM Trust.

12 4. The USACM Trust reserves the right to further object to any and all Claims,  
13 whether or not the subject of this Objection, for allowance and/or distribution purposes on  
14 any other grounds. The USACM Trust further reserves the right to modify, supplement  
15 and/or amend this Objection as it pertains to any Claim or claimant herein.

16 5. For the convenience of the Court and the parties, the USACM Trust will  
17 endeavor to file any subsequent objections to the Claims on a loan by loan basis. Thus, this  
18 Objection is one of a series of many potential objections to those Claims that are asserted,  
19 in whole or in part, on the basis of an investment that has been repaid in full.

20  
21  
22  
23  
24  
25  
26



## VI. CONCLUSION

The USACM Trust respectfully requests that the Court allow the amounts listed as “Unremitted Principal” on Exhibit A, but disallow the claims listed in **Exhibit A** to the extent those claims are based upon a Direct Lender investment in the Copper Sage I Loan. The USACM Trust also requests such other and further relief as is just and proper.

Dated: March 26, 2009.

LEWIS AND ROCA LLP

By /s/ John Hinderaker (#18024)  
Rob Charles, NV 6593  
John C. Hinderaker, AZ 18024 (*pro hac vice*)  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169  
Telephone: (702) 949-8200  
Facsimile: (702) 949-8398  
E-mail: [jhinderaker@lrlaw.com](mailto:jhinderaker@lrlaw.com)  
*Attorneys for the USACM Liquidating Trust*

Copy of the foregoing and the pertinent portion of Exhibit A mailed by first class postage prepaid U.S. mail on March 26, 2009 to:

All parties in interest listed on  
Exhibit A attached

/s/ Renee L. Creswell  
Renee L. Creswell